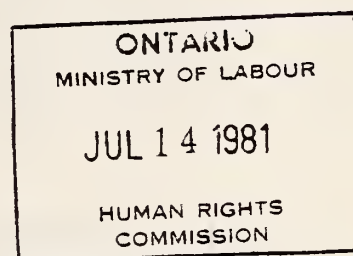


IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE,
R.S.O. 1970 c. 318, AS AMENDED

AND IN THE MATTER OF A COMPLAINT BY MRS. FLORENCE SHAKES
ALLEGING DISCRIMINATION IN EMPLOYMENT BY REX PAK LIMITED,
1399 KENNEDY ROAD, UNIT NO. 9, SCARBOROUGH, ONTARIO.

BOARD OF INQUIRY

PROFESSOR IAN A. HUNTER



APPEARANCES

Mr. Peter Jacobsen:	Counsel for the Ontario Human Rights Commission and the Complainant, Mrs. Florence Shakes
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Mr. W.V. Sasso:	Counsel to Rex Pak Limited
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DECISION

On 22 October 1979 Mrs. Florence Shakes filed a formal complaint of discrimination under the Ontario Human Rights Code against Rex Pak Limited, their servants and agents, 1399 Kennedy Road, Scarborough, Ontario. On 11 December 1980, I was appointed by The Honourable Robert Elgie, Minister of Labour, as a Board of Inquiry to hear and decide this complaint. On June 10 and 11, 1981 hearings were held in Toronto at which evidence and submissions were heard.

On October 17, 1979 Mrs. Florence Shakes, a black woman who lived at 2743 Victoria Park Avenue in Scarborough, saw an advertisement in the "General Help" section of the Scarboro Mirror; the advertisement (exhibit #3) was as follows: "Food packaging help required; day and afternoon shifts; Kennedy-Ellesmere area; apply Rex Pak Limited, 1399 Kennedy Road, Door #9." Mrs. Shakes saw this advertisement at approximately 10:00 a.m. on October 17, and decided immediately to apply. She arrived at Rex Pak at about 11:30 a.m. One entered the Rex Pak premises into a reception, or waiting room, area and it was here that job application forms were given out by a secretary, Mrs. Bonnie Diamond, and completed by applicants. When Mrs. Shakes entered the reception area she noticed "about eight white girls" there filling out application forms. Mrs. Shakes approached Mrs. Diamond and told her that she was looking for a job. Mrs. Diamond gave her an application form.

A white woman, Jacqueline Pelkola, who had completed her form yielded her chair so that Mrs. Shakes could be seated while completing her form.

Mrs. Shakes testified that she completed her application form (exhibit #4), gave it to Mrs. Diamond, and then Mrs. Diamond took it into the office of Mr. Steve Napier, whose functions included interviewing prospective employees. Steve Napier, on the other hand, testified Mrs. Shakes' application form was initially incomplete and that he had to send it back with Mrs. Diamond with instructions to Mrs. Shakes to complete it properly. Mr. Napier's version is supported by Mrs. Diamond's testimony (transcript, page 126). In my view, I am not required to choose between these conflicting versions, because I am satisfied that whether or not Mrs. Shakes' application form was completed initially, or only subsequently, it was sufficiently complete by the time she was interviewed by Mr. Napier as to present no obstacle to her being hired.

Mrs. Shakes testified that Mr. Napier called her into his office, looked over the application form, and asked her what shift she preferred. She indicated days. Mr. Napier is alleged then to have said that he had only one position left. Mrs. Shakes then said she would take afternoons. Mr. Napier is then alleged to have told Mrs. Shakes to leave her application form with Rex Pak and if she was needed she would be called.

Mr. Napier's version of the interview is slightly different. He testified that he asked her if she could work days or afternoons. Mrs. Shakes is alleged to have replied that she could work only days. Mr. Napier's testimony proceeds as follows: "And then I said, well, you know, 'I'm not sure if there's any positions open on the days; there may be another position open later that I could call you.'"

And she says, 'Okay, I'll take the position on the afternoon'--and--let me see now--I said, well, I would give her a call if there were any positions open on the afternoon."

At this point, Mr. Napier testified that Mrs. Shakes became insistent that she be given a job and raised her voice: "Well, she said--something to the effect that 'I want the job on the afternoon', and she demanded the job on the afternoon." Then Mrs. Shakes left the office.

From the evidence, I find as a fact that Mr. Napier next interviewed a white woman, Mrs. Florence Rose. During the interview Mr. Napier offered her a position on the afternoon shift (4:30 to 11:30 p.m. approximately) to commence the following day.

When Mrs. Shakes (who after her interview remained in the reception area) learned that Mrs. Rose had been offered a job, she concluded that she had been a victim of racial

discrimination and, by her own admission, then had words with the company's secretary. Mrs. Shakes testified that she went over to Bonnie Diamond and said: "Your personnel is prejudiced." Mr. Steve Napier testified that he heard Mrs. Shakes say to Bonnie Diamond: "Your personnel is a racist pig." Mrs. Diamond testified that Mrs. Shakes said to her: "That man [i.e. Steve Napier] is prejudiced."

Nothing turns on the slight differences in terminology. The incident occurred two years ago and such slight variations are attributable to the passage of time and the inability of human memory to produce verbatim recall. Clearly Mrs. Shakes made a fuss in the reception area about what she considered to be racial discrimination. Equally clearly, in my opinion, Mr. Napier's decision not to hire Mrs. Shakes--at least not to hire her on 17 October 1979--had already been made.

The precise issue I must determine is this: From the evidence, has the Commission satisfied me on a balance of probabilities that Mr. Steve Napier refused to recruit Mrs. Bonnie Shakes for employment at Rex Pak Limited on 17 October 1979 because of her race and colour?

In fairness to Mr. Jacobsen's submissions on the law, I should indicate that in analysing the evidence in order to answer this question I have kept in mind the decision of Hughes J. in R. v. Bushnell Communications Ltd., [1974] 1 O.R. 442 (affirmed (1975) 4 O.R. (2d) 288); the ratio of this

decision is that if a statutorily prohibited ground of discrimination is present to the mind of an employer in his decision to dismiss, either as a main reason or as one incidental but operative to it, that will be sufficient to establish that the decision was taken "because of" the prohibited ground.

Proof of discrimination is almost invariably by circumstantial evidence. Only rarely at a Board of Inquiry will there be an admission by the respondent or other direct evidence. In an employment complaint, the Commission usually establishes a prima facie case by proving (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e., race, colour, etc.) subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the Commission. In the case of Kennedy v. Mohawk College (1973), the Board of Inquiry chairman (Professor Borins) stated: (at page 4-5)

"Discrimination on the grounds of race or colour is frequently practised in a very subtle manner. Overt discrimination on these grounds is not

present in every discriminatory situation or occurrence. In a case where direct evidence of discrimination is absent it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analysed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature and purpose of such conduct. It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness."

In the instant case, the evidence satisfies me that

(a) Mrs. Shakes was qualified for employment at Rex Pak;
(b) that she was not hired; and (c) that Mrs. Florence Rose, a white woman no better qualified than Mrs. Shakes, was hired after Mrs. Shakes. Therefore, the Commission has made out a prima facie case of discrimination.

What is the respondent's explanation?

Rex Pak Limited is engaged in custom or contract food packaging which is done on automated assembly lines. The exact number of employees required by Rex Pak on any given day will depend on two factors: (1) how many assembly lines are running, and (2) how many shifts. Mr. Steve Napier

testified that their requirements would change daily. The fluidity of Rex Pak's personnel requirements, combined with a high turnover rate among employees, means that Rex Pak is, in a sense, always in the market for at least the names and addresses of prospective assembly line packers.

Mr. Steve Napier, who assists the company president--his father, Mr. Douglas Napier--testified that Rex Pak took on a number of new packing contracts in the summer of 1979. To obtain adequate employees to staff the assembly lines to fulfill these contracts it became necessary--for the first time in the company's five year history--to advertise. The advertisement in the Scarboro Mirror to which Mrs. Florence Shakes responded ran once in early September of 1979, once in late September, then on October 17, 1979. Each time the advertisement ran, the public response was considerable so that, by the end of September, the company had approximately 100 applications on file.

Mr. Steve Napier's standard hiring procedure was to look over the completed application form of job applicants. If he had time, he would then give the applicant a short interview. If he did not have time, the application form would be retained by the company and that employee might subsequently be called in to work. Ann Debreau, a witness called by the Commission, obtained employment in this way; she returned a completed application form to Rex Pak via her

mother (who worked there) and subsequently had an interview with Mr. Steve Napier and a few days later was called by telephone to come into work.

When the October 17, 1979 advertisement appeared, Mr. Napier was looking for a total of four or five employees, some for the day shift (8:30 a.m. - 4:30 p.m.), some for the afternoon shift (4:30 - 11:30 p.m.). Rex Pak had just recently gone to two shifts; the maximum number of employees on the day shift at that time was forty-five to fifty; the maximum on the afternoon shift was twenty-five. The company still had applications on file from the two previous public advertisements.

Mr. Napier arrived at work on October 17, 1979 at approximately 7:00 a.m. He testified that when he arrived there were already applicants lined up at the door. Between 7:00 a.m. and 9:00 a.m. (when Bonnie Diamond arrived) he took applications from twenty to twenty-five applicants. Some were interviewed; some were not. All were told that their applications would be retained and they would be contacted if their services were needed. Thus, before Mrs. Shakes ever arrived at Rex Pak (indeed before she was aware, according to her own testimony, of the advertisement in the Scarborough Mirror) applicants were filling out application forms at Rex Pak and some were being told exactly what Mrs. Shakes was later told. Mr. Napier testified that in all there were seventy to seventy-five applicants on October 17, 1979. Four, or perhaps five,

people were hired. All completed application forms. Some were interviewed.

The uncontradicted evidence before the Board is that some white applicants who came to Rex Pak both before and after Florence Shakes, on October 17, 1979 received exactly the same treatment from Mr. Napier as she received. They completed application forms and were told that they would be called if needed. Four or five applicants were offered positions during the interviews. In the absence of other evidence, I cannot conclude that simply because Mrs. Shakes was interviewed but not offered an immediate position, while Mrs. Rose was interviewed next and offered a position, that Mrs. Shakes was a victim of racial discrimination.

Nor am I led to such a conclusion by the uncontradicted evidence of the respondent concerning Rex Pak's general hiring policies. Mr. Douglas Napier, the president and general manager of Rex Pak, testified. Prior to founding Rex Pak in July, 1974 he was the president of Dart Packaging, a company similarly engaged in food packing and having as many as 130 employees. Mr. Douglas Napier testified that black employees comprised approximately sixty per cent of the work force at Dart Packaging. He reiterated forcefully that Rex Pak's employment policy had always been one of equal opportunity and would continue to be so. Furthermore, the testimony of both Steve Napier and Doug Napier was that Rex Pak employed

black assembly line workers before and after October 17, 1979; indeed both testified that at least one black assembly line worker, Mr. Andrew Boxall, was employed on that very date. Mr. Doug Napier testified that he had made some effort to examine Rex Pak's employment records and that in the fall of 1979 there were at least nine assembly line packers who were members of visible minority groups, some of whom were black. This testimony was not challenged. Similarly, Bonnie Diamond, who has been secretary at Rex Pak since November 1978, testified that the company's hiring policies did not discriminate against any individual or group distinguished by race or colour.


Mr. Steve Napier's explanation for his failure to offer Mrs. Florence Shakes a position on October 17, 1979 is quite simple: many people (70-75) applied that day for comparatively few (4 or 5) positions. All completed application forms which would be retained on file. Some were interviewed. On those whom he interviewed he was faced with making a snap decision, "a value judgment" (as his father referred to it in evidence) as to whether to hire the individual on the spot to start work immediately (as in Florence Rose's case) or to keep the application on file and contact that person if and when additional staff became necessary. Mr. Napier admits that his subjective "value judgment" in Mrs. Shakes case was not to hire her immediately but rather to keep her application on file. I have heard no evidence which warrants me drawing the conclusion that this--admittedly subjective--

judgment was prejudiced by considerations of race and colour. From the evidence, I infer that the main reason for this decision was Mrs. Shakes' insistence during the interview that she be hired which, in the vernacular, rubbed Steve Napier the wrong way. Under oath, he testified that race and colour had nothing whatever to do with his decision. I heard no evidence which would lead me to discount his sworn testimony. Also, I carefully observed Mr. Steve Napier's demeanour as he gave his evidence and I am satisfied that he was truthful.

In holding that Mrs. Shakes' allegation of discrimination has not been proved, I intend no criticism either of the complainant or of the Ontario Human Rights Commission. One can readily understand how Mrs. Shakes perceived herself as the victim of discrimination on October 17, 1979. Similarly, the Ontario Human Rights Commission properly discharged its responsibilities by investigating and attempting to conciliate her complaint; and, when that failed, by recommending appointment of a Board of Inquiry.

On all of the evidence, I find that the Commission has failed to prove that Mrs. Florence Shakes was denied employment by Rex Pak Limited because of her race and colour, and accordingly the complaint dated October 22, 1979 is hereby dismissed.

DATED at the City of London in the County of
Middlesex this 24th day of June, 1981.



IAN A. HUNTER
CHAIRMAN
BOARD OF INQUIRY

